Multi-Purpose Finance Bhd v Tan Sri Dato' Ting Pek Khiing

HIGH COURT (KUALA LUMPUR) — SUIT NO S2–22–583 OF 1997
KAMALANATHAN RATNAM J
3 NOVEMBER 1998

Civil Procedure *— Injunction — Injunction to restrain sale of shares pledged as security for loan — Various issues to be resolved — Whether balance of convenience lies in granting injunction*

The defendant applied inter partes to restrain the plaintiff from force-selling the original shares in the plaintiff's possession which had been pledged in its favour by the defendant as security for the loan.

Held, extending the ex parte injunction granted earlier:

There are numerous issues that had to be resolved in this case. Since the plaintiff had already proceeded with an application for summary judgment, it was best that all these issues be raised at that stage for the court to consider if there were triable issues. It was also clear that the balance of convenience lay in the court granting this order and stopping any forced sale. It was also necessary to maintain status quo (see p 232C–D).

[Bahasa Malaysia summary

Defendan telah memohon secara inter partes untuk menahan plaintif daripada menjual paksa saham-saham asal dalam milikan plaintif yang telah dicagarkan kepadanya oleh defendan sebagai cagaran untuk pinjaman.

Diputuskan, melanjutkan injunksi ex parte yang diberikan lebih awal:

Terdapat pelbagai isu yang harus diselesaikan dalam kes ini. Oleh kerana plaintif telah pun meneruskan permohonan untuk penghakiman terus, adalah wajar untuk segala isu ini ditimbulkan pada peringkat itu untuk mahkamah menimbang jika terdapat isu yang boleh dibicarakan. Adalah juga jelas bahawa imbangan kemudahan terletak dalam pemberian perintah ini oleh mahkamah dan pamberhentian sebarang jualan paksa. Ia juga perlu untuk mengekalkan status quo (lihat ms 232C-D).]

Notes

For cases on injunction generally, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1927–2353.

S Ashok Kandiah (*A Zahari Kanapathy Thulasi*) for the respondent/plaintiff.

Lim Chor Pee (Lathika Prabhakaran and *SP Siew* with him) (*Chor Pee Anwarul & Co*) for the applicant/defendant. A

Cur Adv Vult

Kamalanathan Ratnam J: B

Facts

By a facilities agreement dated 23 May 1997 ('the facilities agreement') made between the plaintiff and the defendant, the plaintiff lent to the defendant RM40m ('the loan'). As security for the loan and pursuant to a memorandum of deposit of shares ('the memo') also dated 23 May 1997 C made between the plaintiff and the defendant, the defendant transferred, by way of pledge, a total of 7.3m shares in Ekran Bhd ('Ekran'), 5.5m shares in Granite Industries Bhd ('Granite'), 1m shares in Pacific Chemicals Bhd ('Pacific Chemical') and 1,780,000 shares in PWE Industries Bhd ('PWE') to the plaintiff, collectively called the original shares.

On 18 December 1997, the plaintiff filed this action against the D defendant to recover the sum of RM40,537,855.63 due under the facilities agreement. In January and February 1998, the plaintiff force-sold some of the original shares. The plaintiff has also filed an application for summary judgment. However, the said application is opposed by the defendant on the basis that the parties had entered into a settlement agreement by which, in E consideration of the defendant providing further security in the form of 9.8m ordinary shares in Amal Bakti Sdn Bhd ('Bakti shares'), the plaintiff agreed or promised to forbear from pursuing any claim against the defendant. The plaintiff's case is that the parties only entered into 'without prejudice' negotiations and that the settlement agreement was made subject to certain conditions precedent which were not fulfilled. F

The application

This is the inter partes hearing of an application by the defendant to restrain the plaintiff from force-selling the original shares in the plaintiff's possession which have been pledged in its favour by the defendant as security for the G loan.

Findings of the court

At this stage of the proceedings, all I have to do is to see if there is a reasonable case created by the defendant to grant this order. Any findings I H might make cannot be held to bind the parties in subsequent applications arising in this suit, or in the suit proper. Having perused the settlement agreement, I am satisfied that the parties had discussed and agreed on the terms of settlement on 11 February 1998. The next day, the defendant confirmed these terms with the plaintiff by way of his letter dated 12 February 1998. He had reiterated the essential terms of the settlement I agreement in his letter which were that he would pledge the Bakti shares as continuing security for the loan and agreed to make a monthly payment of

RM1.6m towards the outstanding loan. The plaintiff had agreed to immediately withdraw this suit with liberty to file afresh and also agreed to cease force-selling the original shares. The defendant accordingly forwarded the original Bakti share certificates together with a signed blank transfer of Securities Form 32A and sent it to the plaintiff with his letter dated 12 February 1998. He also paid two monthly instalments of RM1.6m each, to the plaintiff. In the meantime, the plaintiff repudiated and denied the settlement agreement.

On the evidence before me, I am unable to accept the plaintiff's contention that all discussions were on a without prejudice basis. The letters earlier referred to were open and not without prejudice. In my book *A Practical Approach to Evidence in Malaysia and Singapore* (1993), I have said at p 246:

> But it is also settled law that where the negotiations conducted without prejudice lead to a settlement, then the letters become admissible in evidence of the terms of the agreement ... .

Even assuming that the discussions were on a without prejudice basis then the conduct of the defendant in putting the terms down in writing and acting on the said terms, leads me to reject the plaintiff's contention that the negotiations were still continuing on a without prejudice basis. The evidence discloses that the plaintiff had never refuted nor disputed the terms of the settlement agreement as stated by the defendant in his letter dated 12 February 1998. The defendant's solicitors had in any case written to the plaintiff's solicitors on 13 February 1998 to confirm that the parties had reached a settlement and that this present suit ought to be withdrawn with liberty to file afresh. This letter has not been denied. The plaintiff also wrote to the defendant on 25 February 1998 in connection with the settlement agreement and forwarded to the defendant specimen documents to be signed by various parties. Surely if the plaintiff had not agreed to the terms of the settlement agreement as set out in the defendant's letter dated 12 February 1998, it was incumbent upon the plaintiff to have said so before its letter to the defendant dated 25 February 1998.

However, on 17 April 1998 the plaintiff sent a letter to the defendant requiring the defendant, amongst others, to furnish a fresh memorandum of deposit of shares. The defendant had previously executed a memorandum of deposit of shares when he was first granted the facilities. I cannot but hold that it would be natural for the defendant to assume that any further pledge of security would be subject to the same memorandum of deposit that he had already signed and that the subsequent request for the memorandum of deposit was nothing more than a mere formal request of what has already been done. The plaintiff's contention that because the defendant had failed to execute the second memorandum of deposit, the plaintiff has refused to withdraw the suit is a contention that needs to be proved to the court's satisfaction. Therefore, the ultimatum issued by the plaintiff on 10 June 1998 that unless the defendant executed the second memorandum of deposit and further provided certain other documents within 14 days, the plaintiff would hold the 'negotiations' as having failed is, for the basis of this

application, unacceptable. I will not for the purposes of this application make a finding that in law there arose a binding settlement agreement between the parties as at 11 February 1998. Suffice it for me to hold that for the purposes of this application the defendant has satisfied me that I ought to grant an order in terms of the defendant's application.

In fact on 7 July 1998, long after the plaintiff has contended that there was no settlement agreement reached, both parties held a meeting when it was agreed that the Bakti shares deposited with the plaintiff be sold since the plaintiff had indicated that it had a buyer. It was agreed that the said shares would be sold, subject to a price agreeable to the defendant, and that the proceeds of the sale would be utilized to settle the moneys owed by the defendant to the plaintiff. Whether this agreement constitutes a variation to the settlement agreement, as argued by the defendant, is another issue that moves me to grant an order in terms of this application.

As I said, there are numerous issues that have to be resolved. Since the plaintiff has already proceeded with an application for summary judgment, it is best that all these issues be raised at that stage for the court to consider if there are triable issues. It is also clear that the balance of convenience lies in me granting this order and stopping any forced sale. It is also necessary to maintain status quo.

All that the plaintiff has done so far is to deny that there was a binding settlement agreement and that pursuant thereto, it had promised to forbear from pursuing any claim against the defendant. The plaintiff also denied that it had agreed to sell the Bakti shares on 7 July 1998. Whether the requirement of the execution of the second memorandum of deposit together with the other documents was an express pre-condition of the settlement agreement is a matter for the judge hearing the application for summary judgment, or trial, to decide.

I therefore order that the ex parte injunction granted by me on 23 September 1998 be extended until after judgment in this action. I also award costs to the defendant.

Injunction extended.

Reported by Loo Lai Mee